

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4307 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

VASANJIBHAI GOKALBHAI PATEL

Versus

DY. COLLECTOR

Appearance:

MR BJ JADEJA for Petitioner

MR DN PATEL, AGP for Respondent No. 1, 2

CORAM : MR.JUSTICE B.C.PATEL

Date of decision: 18/04/98

ORAL JUDGEMENT

1. Petitioner has challenged the order passed by the Dy. Collector, Songadh, District Surat in Case No. JMN/73AA/Vihan-52/85, dated 30.11.85 vide Annexure A and confirmed in Revision under section 211 of the Bombay Land Revenue Code by Dy. Secretary, Revenue, State of Gujarat dated 27th February, 1987 being no. S.R.D./JMN/562/86 vide annexure B.

2. Respondent No.2 Shri Bhagabhai Manchhabhai Rathod was holding a new tenure land admeasuring 0 acre 36

gunthas of block No. 71 (of Survey No. 624) at village Vihan, Taluka Kamrej, District Surat. From the proceedings, it appears that the said Shri Bhagabhai Manchhabhai Rathod - respondent No.2 herein was in need of money as he was required to pay govt. debt as well as other debts. On 28th February, 1978, an agreement to sell came to be executed and an application for permission was forwarded under section 43 of the Bombay Tenancy & Agricultural Lands Act, 1948. Prant Officer on 18.11.80 after being satisfied granted permission under section 43 of the said Act. Thereafter a registered sale deed came to be executed on 14.7.81 which also reveals that the said Bhagabhai Manchhabhai respondent no.2 herein is a tribal. The land in question was 36 gunthas, less than one acre for which amount of Rs. 7,000/- was paid and as held by the Dy. Collector, the price fixed was quite reasonable.

3. Proceedings came to be initiated by issuance of show cause notice on 16.8.84 under section 73AA of Bombay Land Revenue Code, 1879 by the Deputy Collector, calling upon the petitioner herein as to why the transfer should not be declared as invalid, why transaction should not be set aside and after restoring the land to the government why three times fine of the value of the land should not be imposed.

4. It is in view of the said show cause notice that the petitioner as well as Shri Bhagabhai Manchhabhai appeared before the authority and Shri Bhagabhaia Manchhabhai Rathod - respondent no.2 herein pointed out that new tenure land was required to be transferred for which permission was granted by Prant Officer and in view of this, document was executed and registered on 14.7.81. He was not even willing to take possession of the land if he was offered the same. Not only this, but in affidavit dated 17.12.79 (at page 85 of the record as mentioned in the order by respondent no.1) it has been pointed out that the land in question was transferred on 28.2.78 i.e. the date on which agreement to sell came to be executed and the request was made to withdraw the said show cause notice.

5. Despite (1) the possession being handed over on 28.2.78, (2) under permission granted by the Prant Officer under section 43 of the Bombay Tenancy & Agricultural Lands Act, 1948, the entry being made in form no.6 at serial no. 3038 dated 20th February, 1982 indicating the permission granted by the Prant Officer, Olpad on 18.11.80 and (3) on 14.7.81, a registered sale deed being executed, after a period of three years notice

came to be issued. The Deputy Collector passed an order holding that the transfer is in contravention of the provisions of the said Act and he forfeited the land in question and imposed a fine of Rs. 7,000/- by an order dated 30.11.85 vide Annexure A. The said order came to be challenged by preferring a revision application wherein the aforesaid aspects were pointed out, but the application came to be rejected vide annexure B.

6. Mr. Jadeja, learned advocate submitted that, the proceedings are initiated without considering that section 73AA of the Bombay Land Revenue Code is inapplicable as transfer took place much before the said provision came into force. He further submitted that even assuming that the provision is applicable, exercise of power beyond reasonable period is not permissible and therefore also the notice issued and orders passed thereon must be quashed.

7. Mr. Jadeja, learned advocate appearing for the petitioner pointed out that when there was uncontroverted testimony of respondent no.2 to the effect that the transfer took place on 28.2.78 i.e. the date when agreement to sell came to be executed, the provisions contained in section 73AA of Bombay Land Revenue Code, 1879 could not have been attracted. Section 73AA putting restriction on transfer of occupancies of tribals to tribals or non tribals was brought into force for the first time on 1.2.81 by Act No. 37 of 1980. This aspect of coming into force of the provisions contained in section 73AA has been considered by the revisional authority at page 18, pointing out that it has come into force on 1.2.81. Thus, in view of this specific position pointed out by Mr. Jadeja, that the transfer took place before section 73AA came into force and therefore, the proceedings initiated against the petitioner are required to be set aside as on the date there was no restriction as mentioned in section 73AA. As there was transfer of possession, Mr. Jadeja, learned advocate for the petitioner submitted that it is sufficient to indicate that transfer took place earlier and merely because under a statute permission was required to be taken which was granted on 18.1.80 and thereafter the sale deed was executed, it does not mean that the section can be said to be applicable. The word 'transfer' is required to be understood in a wider sense. It is not necessary that when actual transfer of a property takes place, there must be transfer of title. In a given case, there may be only transfer of possession and document may be executed later on and in a given case, there may be a document for transfer of a property on a future date but there may not

be any actual transfer of property or possession may not have been handed over on the date on which the agreement is executed. Section 73AA restricts transfer of possession of occupancy to another. It would be in the fitness of things to consider the provisions contained in Order 21 Rule 102 of Code of Civil Procedure, by this Court in case of Lajjashanker Keshavji Joshi v. State reported in 1985 (2) GLR 658.

7. "While considering the phrase "transfer the property" used in Order 21 rule 102 of the Civil Procedure Code which provides that nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person, the Madras High Court in the case of Kangasabhai v. Poornathammal AIR 1947 Madras 458, had held that the words "transferred the property" should be understood in a wide sense so as to include both 'transfer of title' as well as 'transfer of possession'." The relevant discussion is in paragraph 6 which is as under:-

(6) The only question, therefore, which remains is whether R. 102 applies to the facts of this case. Has the judgment debtor "transferred" the property to the petitioner after the institution of the respondent's suit? He has certainly not executed any conveyance to the petitioner. Nor has he purported to transfer or assign any title to the property to the petitioner. The only act which he has done is to quit and deliver possession of the property to the petitioner, after receipt of a notice from him to quit. In my opinion, having regard to the scope of the groups of sections beginning with O.21, R.95, Civil P.C., the words "transferred the property" in R.102 should be understood in a wide sense as to include both 'transfer of title' as well as "transfer of possession". I would even go further and say that primarily it refers to transfer of possession whether accompanied by a purported transfer of title or not. In this view I do not agree with the lower Court in thinking that it cannot be said that the judgment-debtor has transferred the property within the meaning

of Rs. 102. The judgment debtor, in surrendering possession to the petitioner, must be deemed to have "transferred" the property to him within the meaning of this rule. The petitioner would therefore, be not entitled to any relief under R.101.

8. Similar is the view taken by the Division Bench of the Madhya Pradesh High Court in the case of Dhansingh v. Sushilabai, A.I.R. 1968 Madhya Pradesh 229, while interpreting the expression "property cannot be transferred or otherwise dealt with by any party" used in section 52 of the Transfer of Property Act. The Court held that delivery of possession of land would be otherwise dealing with the property which is prohibited under section 52 of the Transfer of Property Act."

Mr. Jadeja, learned advocate for the petitioner submitted that in view of this, there was sufficient material before the authority that the transfer took place before section 73AA came into force and that too when one authority was satisfied about the genuineness of the transaction the Deputy Collector as well as the Deputy Secretary ought to have discharged the notice and ought not to have passed the impugned orders. This submission is to be accepted.

8. Mr. Jadeja further submitted that section 73AA prescribes procedure for initiating action. Sub clause 4 of Section 73AA refers to limitation within which action could be taken. Relevant portion of which reads as under.

Sec.73AA (4) :

"(a)....

(b)...

The Collector shall, notwithstanding anything contained in any law for the time being in force, either suo-motu at anytime, or on an application made by the tribal transferor or his successor-in interest at anytime within three years from the said date or the date of such transfer, whichever is later, after issuing a notice to the transferee or his successor in-interest as the case may be, to show cause why the transfer should not be declared void and after making such

inquiry as he thinks fit, declare the transfer of such occupancy to be void and thereupon the occupancy together with the standing crops thereon, if any, shall vest in the State Government free from all encumbrances."

9. Shri Jadeja submitted that in view of this, action should have been taken within a period of three years i.e. reasonable time where no time limit is prescribed. When no period of limitation is prescribed, then power must be exercised within a reasonable period and the length of reasonable time must be determined by facts and circumstances of the case and the nature of the order. He invited my attention to a reported judgment of the apex court in the case of State of Gujarat v. Raghav Natha, reported in 10 GLR 992 and the decision subsequently followed by this Court and other Courts. The question which arose before the apex court was whether the Commissioner can revise an order made under section 65 Bombay Land Revenue Code at anytime? No period of limitation was prescribed, but as the apex court pointed out that this power must be exercised within a reasonable period and the length of time must be determined by the facts and circumstances, and the nature of the order being revised. In that case, the Commissioner set aside the order of Collector on October 12, 1961 more than a year after the order passed by the Collector. The apex court took the view that this order was passed too late. It is required to be noted that Bombay Tenancy & Agricultural Lands Act, 1948 has also put restriction on transfer of land. Under sub section 1(a) of section 43 of Bombay Tenancy & Agricultural Lands Act, 1948, sanction is a condition precedent and that sanction has been obtained by the petitioner herein and entry has also been made in this behalf. Document has also been registered only after the permission was granted and thus, authorities were aware that permission has been granted and the document has been executed. Action was not taken immediately on presentation of the document but after a period of three years action is taken and considering the facts and circumstances of this case, it would not be just and proper to hold that the power is exercised within a reasonable time.

10. Learned Additional Government Pleader Mr. Patel appearing for the respondent in the matter after going through the matter could not point out any material indicating that the transfer took place after section 73AA of the Bombay Land Revenue Code came into force or that the action which was required to be taken has been

taken within a reasonable period. Once the authority being satisfied about the transaction, the Deputy Collector ought to have discharged the show cause notice.

11. In view of the aforesaid facts and circumstances of the case, this petition is required to be allowed. Orders at Annexures A & B are quashed and set aside. Rule is made absolute accordingly with no order as to costs.
